subscribers and force cable operators to recover them, if at all, in upper tiers or premium services.

Likewise, NATOA seeks to bury the real cost of local fees and taxes by insisting that operators receive local approval from the franchising authority before passing along the very cost increases imposed by that franchising authority. Continental has previously explained that increases in franchise fees, taxes, and PEG support should be flowed through without consent. There is no basis for the government which imposes those costs to object to the pass through of costs which are entirely within its control.

The same disingenuous effort to shift costs away from basic appears in NATOA's suggestion that retransmission consent cost should not be passed through to basic customers, on the theory that customers already place a "value" on such signals and therefore should be assumed to have paid for them. Perceived value does not define cost, particularly because customers are not yet paying for retransmission consent. When those costs <u>are</u> incurred, they should flow through to customers.

6. "<u>Normative Costs</u>"

NATOA, Austin, NAB and CFA all seek to limit some or all of cable's recovery to "normative" costs. In reality, however, the cost structure of the industry has not stabilized sufficiently to calculate a national average cost, nor is it soon likely to do so in an era of rapid technological innovation. Companies such as Continental have made large increases in capital expenditures since 1984, most of them in disproportionately large "lumps." The Comments which advocate "normative costs" are notably silent on specifics, leaving the heavy empirical lifting to the Commission. They have also couched their request for "normative" rates with demands that systems with below average costs reduce rates still further. This structure of rate regulation is not only administratively overwhelming, but a formula for confiscation. A more detailed critique is contained in Appendix A.

7. Consumer Protection

One last example of NATOA's disregard for the statute is its suggestion that state and local consumer protection jurisdiction provides a blank check for franchising authorities to override the limitations on rate regulation set forth in Section 623. NATOA contends (p.54, n.24), for example, that the Commission's equipment pricing rules would merely "supplement" a franchising authority's "consumer protection" rules on the same equipment. The authoritative history accompanying the 1984 Act continues to provide: "A state or franchising authority may not, for instance, regulate the rates for cable service in violation of Section 623 of Title VI, and attempt to justify such regulation as a 'consumer protection' measure." H. Rep. 98-934 at 79. The 1992 Act rewrote both the rate regulation and consumer protection sections of the legislation. Section 623 of the 1992 Act sets forth, in explicit detail, how franchising authorities may regulate rates for cable service and equipment. Since Congress has enacted a broad regulatory scheme regarding rate regulation, it is neither necessary or appropriate to apply more general consumer protection-based common law principles to this area.[3/]

B. Equipment Pricing [¶63-71]

Continental's Comments present a detailed model for the calculation of regulated equipment costs based upon accepted costing models. The model includes recovery of overheads and the cost of capital. NATOA suggests that "cost" is the invoice price of the equipment delivered to the operator, as though there are no other costs incurred in storing, deploying, repairing, maintaining, replacing, or financing equipment. NATOA goes still further to suggest that while service prices should be regulated on the basis of elaborate cost of service studies, operators who have "traditionally" provided equipment with a particular level of service should continue to do so, for free. Things don't come

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3/ See, e.g., Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1982); Texas & P.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

free even if NATOA wishes it so. The statute suggests unbundling and requires compensation.

NATOA reaches again in its proposal for jurisdiction over the pricing of all equipment used by basic customers. Considering that NATOA recommends that basic be a mandatory buy through for all service, that would leave the FCC with digital music receivers and local governments with all else. Continental's proposal to link equipment with the service for which it is deployed is a far more rational, statutorily based approach.

C. Implementation & Enforcement [¶79-89]

1. Delays

Continental strongly opposes NATOA's recommendations for processing basic rate adjustments. Its suggestions seem designed to artificially postpone all increases, however legitimate. Under the NATOA proposal, even an adjustment within benchmarks could take 240 days at the local level:

30 days	notice
120 days	review
90 days	additional review
240 days	total

NATOA would leave the increase further stayed during any appeal to the FCC. Considering the Commission's well-known limitations on staff, and expected delays, virtually every contested rate increase would be delayed indefinitely--even if the city did not invoke the power it requests to "freeze" rates.

In the meantime, every month which passed would be revenues foregone by an operator held captive by process. The franchising authority would be immune from liability in damages. The subscribers served when the rate is finally put into effect would be less than understanding in receiving requests for payment of a retroactive surcharge to make up for months (sometimes years) of past rate increases that should have been in effect had the franchising authority not suspended them. What would have been a 5% increase might become a far less palatable 15% increase, with resulting disconnections.

Nor has NATOA made any effort to accommodate the legitimate cash flow needs of operators faced with bank covenants and operating costs. The delayed implementation proposed by NATOA is an undisguised effort to import into the benchmark process the very delays and procedural complications incident to classical utility regulation, which both the Act and the Commission's Notice seek to avoid.

2. Paperwork

NATOA also proposes that every rate adjustment proposed by an operator not only be announced to customers -- a proposal with which we agree -- but that the operator provide to each customer a care package explaining the mechanics of lodging rate complaints, providing the background benchmark comparisons, and enclosing the necessary FCC complaint forms. The amount of paper which would be needlessly generated by such mailings would dwarf the filings in these Cable Act rulemakings, without substantial benefit. Surely if a rate increase is considered objectionable to a community, one or more members will lodge a complaint. Continental fully anticipates a thriving municipal consulting business offering turnkey rate complaints to franchising authorities on NLC's or M&H's mailing list. There is no reason to exacerbate the problems with redundant mailings. Sec. 76.607 already provides each customer with a contact person for complaints. NATOA's proposal would create wasteful, duplicative paperwork and generate form complaints.

3. Complaint Records

NATOA also makes the sweeping proposal that every rate complaint received by an operator be retained and made available for municipal inspection. Verbal complaints received by customer service representatives are typically not reduced to paper records, but are entered into the customer's electronic file. That file also contains personally identifiable information. Disclosure is restricted by Sec. 631 of the Act, as the Commission recognized in adopting Rule 76.607. Cable Television Technical and Operational Requirements, MM Docket 91-169, Mimeo

30740 at ¶39 (Nov. 10, 1992). In addition, the receipt of complaints about rates does not evidence violation of rule. The more traditional manner for a city to determine satisfaction with cable service is to rely upon constituent complaints to the franchising authority, which is the underpinning of Rule 76.607. Franchising authorities also have recourse to public meetings, and even surveys, if they wish to judge subjective satisfaction. However, the purpose of the rate regulations should be to import objectivity into the rate process, and not revert to a system of rate regulation based upon emotion and popularity, or to create incentives for the artificial generation of complaints.

4. Marketing Materials

NATOA suggests that every piece of sales literature include a reference to the availability of broadcast basic. We have explained in Comments that such a rule would disable systems from using nationally generated promotions (such as those by HBO and Showtime), and restrict an operator's ability to promote any particular special, such as a new package associated with a free installation. So long as customers are provided annual notice of the availability of broadcast basic, the Commission should not impose such an unwarranted restraint on marketing material.

5. Proprietary Information

NATOA envisions a local procedure in which any adjustment of rates must be accompanied by a cost of service justification, and where any franchising authority could open a rate case and demand open access to all underlying cost data, particularly proprietary affiliation agreements. Continental submits that this approach is a typical element in conventional utility ratemaking, and that access to such records in unnecessary for any system which is proposing a price within benchmarks. If a cable operator seeks to exceed benchmarks, then the operator must be prepared to provide access to cost information. But the franchising authorities (like the FCC in tier complaints) must likewise be prepared to extend confidentiality to proprietary and personal information. We set forth a workable method in our Comments.

The proposal by NATOA is not workable, because it subjects all submissions to open public disclosure whenever state open records laws require it. The Reporters Committee publishes volumes demonstrating just how open are records submitted to state governments under state law. Austin openly demands that "the public ... must have full access" (p.65) to such information. By contrast, the Commission is charged with the responsibility of formulating standards and guidelines, both procedural and substantive, for basic service regulation. It must use that authority to create a uniform system of confidentiality which may be relied upon by companies which operate nationwide under nationwide contracts and nationwide basic rate standards. Cable operators should be afforded the protections of FCC/FOIA limitations when submitting materials to local governments. Those certified governments will have committed to following federal law in their rate processes, and should likewise afford these federal protections.

6. Remedies

NATOA also proposes that an operator who errs in its rate computation is automatically guilty of substantially violating a material term of the Act, is apparently foreclosed from remedying it, and must therefore be disqualified from franchise renewal. That makes the stakes of every rate adjustment extraordinarily and needlessly high. Congress specifically provided that erroneous rates do not violate the Communications Act. H. Rep. 88. Capital punishment is inappropriate for honest disagreements in applying a new and difficult set of regulations, particularly when only one party is subject to penalty and the other has been immunized. Nor are fines and forfeitures appropriate tools to "punish" an operator whose rates are adjusted to less than the requested level. The Commission well knows the lack of certainty plaguing the rules under consideration. It serves only to increase administrative expenses to expose one party to fines when we will all be learning to apply the new rules. Continental's earlier proposal for adjustment and refunds of overcharges is far more commensurate with the "offense," fully reimburses the customers, and avoids making every disagreement a capital crime.

Contrary to several proposals by franchising authorities, local governments do not have any inherent right to set rates and order rollbacks and refunds. Cable operators who propose rates which exceed benchmarks should be permitted to put the rates into effect, subject to refund from the date of timely objection by a franchising authority. But Section 623(c)(1)(C) grants only the Commission general refund authority. No comparable grant has been given the local franchising authority. Hence, should local authorities seek to reduce existing rates, they would be limited to prospective relief from the conclusion of the rate case.

7. Standard of Review

Continental also disagrees with NATOA's request that every decision made by a franchising authority be afforded the deference of the "arbitrary and capricious" review standard given to expert agencies. The FCC would be forbidden from determining facts *de novo* or from applying its acknowledged expertise. This proposed standard is upside down. Franchising authorities have *no* background or qualifications as expert agencies in determining effective competition or in administering the complex formulae proposed by the Cities. In every one of the Commission's Cable Act rulemakings they have taken positions as zealous advocates without particular regard for the cost or consequences of their proposals. They are certainly not acting as the impartial judges to whom deference may be granted. Moreover, because they are immunized from liability in damages, they have been released from the ordinary incentives for fairness or accuracy which should characterize an expert.

D. Grandfathering

In yet another remarkable example, Austin suggests that the "Dubuque exception" in Section 623(j) -- which grandfathers rate agreements in place on July 1, 1990 if the community had fewer than 3 off-air signals -- should be expanded by Commission fiat to cover all rate agreements regardless of date and circumstances; all agreements to deliver particular services; and that grandfathering works only one way, at the option of the city. The Act itself is quite explicit, however, and limits the Dubuque exception virtually to Dubuque. 138 Cong. Rec. H. 6506 (July 23, 1992). It does not extend beyond the codified cutoff date, nor does it legitimize agreements to provide specific video services which were unlawful (under Section 624) when imposed.

V. CABLE PROGRAMMING SERVICES

A. Tier Complaint Standards [¶91-96]

CFA, NATOA, and NAB have agreed among themselves that there is no difference between basic and tier regulation under the Act and that no cable rates -- including tier rates -- may be measured by reference to existing market rates. This construction makes a mockery of the statute.

- The plain language of Section 623(c)(2)(A) directs the Commission to consider existing market rates in evaluating tier complaints. Indeed, an operator's comparison with his peers is the first criteria specified by Congress.[4/]

- That comparison is perfectly sensible. Congress found that even when totally deregulated, only a minority of cable operators had abused pricing freedom over tiers. The purpose of tier regulation was to "reign in the renegades." 138 Cong. Rec. E 789 (March 6, 1991); H 6556, H 6587, H 6522 (July 23, 1992); S 14224 (Sep. 21, 1992); H. Rep. 33. There is a vast difference between that directive and NATOA's presumption that

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4/ NATOA cites a case supposedly prohibiting reference to market rates when testing the reasonableness of regulated rates. But the case stated that "this does not mean the market price of gas would never ... be a relevant consideration in the setting of area rates." FPC v. Texaco, 417 U.S. 380, 397 (1974). The Natural Gas Act under review in Texaco did not allow for FPC review of market rates in determining whether rates charged were just and reasonable, unlike Section 623(c)(2)(A)-(B).

all satellite tier rates reflect abusive prices which must be reduced.

- Congress specifically considered and rejected a version of the bill which would have exposed the most popular tier to the same regulatory benchmark as basic. The Conference rejected the Senate version of Section 623, and with it the construction of the bill on which the cites (e.g., Austin, p.24) rely for their strained construction.

- Congress assigned basic regulation and tier regulation to different jurisdictions, under different standards described in different subsections of the Act. Although CFA is reluctant to admit it, Congress clearly believed that satellite tier programming, and the development of cable itself, had been propelled by the deregulation of rates. H. Rep. 29. It was not prepared to submit that engine of national innovation to the basic rate formula applied by local governments. It allowed only the FCC to identify the minority of bad actors who abused tier prices and bring them into line with their peers.

- Austin's contention that the Hope/Bluefield standard of utility regulation, cost-of-service accounting, cost manuals and a uniform system of accounts is the best way to regulate tiers probably best reflects the disregard which franchising authorities have for the statute. Such utility style regulation is precisely what Congress asked the FCC to avoid even in basic regulation. Instead, Congress provided the Commission with a balanced set of tools, including basic rate regulation and procedures to resolve complaints about satellite tier pricing by "bad actors," with specific instructions to stay "uncomplicated," to avoid cost allocation manuals and Title II regulation. See, e.g., H. Rep. 83. To apply utility style regulation to tier regulation turns the Act on its head.

Nor is there any practical need to apply the same standards to basic and tier. By comparing basic service rates with comparable rates in markets which have sustained effective competition, the Commission will assure those subscribers who subscribe only to basic the same rates which would apply in competitive markets. By applying broader market standards, and comparing satellite tier rates to comparable rates of comparable systems, customers will be assured that even optional services will not be abused by bad actors.

The best method for combining these approaches is the "B2" method described by NCTA. Customers are required by the Act to buy through basic to reach satellite tiers. The combination of basic rates, satellite tier rates, and the package of equipment needed to receive the combination can readily be measured against the applicable basic benchmark, satellite tier benchmark, and equipment cost cap, in a simple, straightforward analysis. Such an approach presents remarkable advantages, far superior to the cost of service models proposed by NATOA. It applies competitive benchmarks to basic service rates. It simplifies administration of tier and equipment rate regulation by applying the sum of applicable benchmarks to the sum of the regulated prices involved. It also permits the discounting of broadcast basic service, to the advantage of existing basic only subscribers and to the ultimate benefit of the 40% of television households who do not yet subscribe but may be attracted by reduced rates. By looking at the discounted basic rate before judging tier prices, it eliminates the risk of tier complaints which would otherwise discourage such discounting.

Continental believes that taking the NATOA approach -- in which both basic and tier prices are to be evaluated on a pure cost-of-service basis -- would not only sacrifice these benefits, but would accentuate the constitutional problems looming over the rate proposals of NATOA and CFA. We submit that every level of service is constitutionally entitled to the opportunity to earn a nonconfiscatory return, free of compulsory subsidies. But the Cities, CFA, and others clearly want both basic and tier to be deeply discounted. As noted above, the Commission may stimulate the discounting of basic with a B2 approach. But it is not realistic to assume, with NATOA (p.8, n.2) or CFA (p.74), that pay television can pick up the economic and constitutional slack left by deeply discounted tiers. We documented in our Comments the steep decline in pay penetration. It is this loss, primarily due to the popularity of home video and the growth and development of satellite cable networks, which accounts for the dramatic drop in the contribution of pay to overall revenues. CFA is indulging in the most uninformed speculation to assume that a drop in pay penetration reflects pricing abuses on basic. Wishing that cable can be sustained by pay revenues will not make it so, and the regulations cannot be premised on such fantasy.

The notion that the distinct complaint process, standards, and goals of 623(c) are merely a phrasing difference in what is substantively the same law as 623(b) does the grossest disservice to the statute. It would also undo the marketplace for programming innovation. Continental can understand why NAB would seek to destroy its satellite competition. We cannot understand why CFA would savage the programming marketplace by removing the rewards traditionally given for creative productions which win popular following. It feigns a willingness to deliver appropriate rewards for such innovation but would have the Commission saddle cable with returns below even the competitive market, and then subject cable to further reduction to "cost of service" standards.

B. Complaint Procedures

NATOA and Austin propose a 90-120 day period within which complainants could object to satellite tier rate increases -- an extremely long period for a rate adjustment to be clouded. The average subscriber will have paid three or four months of the increase during the interim, and franchising authorities will have had more than ample notice of a change. There is no reason to suppose that franchising authorities and concerned subscribers cannot respond more quickly and move the dispute resolution process forward.

NATOA's further suggestion of a ten month review period is even more distorted than its proposed basic service procedures, and would import even more needless delays in the process.

NATOA insists that cable operators locate and rebate the "actual" subscribers who overpaid, rather than make adjustments prospectively for that class of subscribers. The suggestion has no basis in the statutory language, and imposes unnecessary regulatory costs which will unavoidably be visited on those same subscribers.

VI. UNIFORM RATE STRUCTURE/DISCRIMINATION

A. Uniform Rate Structure [¶111-115]

Only a few comments support the Commission's earlier proposal to require rate uniformity among all communities served by the same system. Most, including NATOA, concur with Continental's approach. Rate structures (not rates) should be uniform within a franchise area. Differentiation should be permitted for multiple subscriber accounts (such as MDUs), commercial agreements, and temporary promotions.

B. Negative Options/Evasions [¶119-121, ¶127]

Municipal efforts to twist the meaning of the Act are perhaps no more obvious than in NATOA's and Austin's proposed evasion rules. While CFA recognized that a revenue neutral price restructuring among services is neither a negative option nor an evasion, NATOA insists that such actions require thorough rate review, governmental approval, mandatory downgrade of customers to the new lowest basic and affirmative assent of all subscribers to restore their original level of service. Austin makes the same request, citing as authority only the Senate's discussion of the defeated provision giving the cities jurisdiction over the most popular tier. The disincentives such extremism imports into the cable business are described in our Comments.

Austin goes still further. It considers evasion to include any addition of programming to a tier if coupled with a rate increase; and any decrease in customer service or signal quality, or the removal of any programming from a tier without a corresponding rate reduction. This ignores the jurisdiction the FCC has over technical standards; the customer service rules and limitations to be established in MM Docket 92-263; Section 624(b)'s continuing restriction against franchising authorities tampering with the selection of particular video services; and specific instruction at Conf. Rep. 65 that changes in programming mix within a tier are exempt. Such proposals would freeze operators in their tracks and subject every editorial decision to the veto of a few.

NATOA would also treat any retiering since October 5, 1992, as evasion. The Act's evasion standards themselves do not become effective until April 3, with rollbacks beginning not earlier than the date of complaint. Congress clearly could have but just as clearly did not adopt a freeze, limit, or other restriction on cable operations during the interim. NATOA has demonstrated nothing insidious about conventional first of the year price adjustments.

Continental submits that these displays of municipal overreaching are the best evidence that franchising authorities cannot be entrusted with the responsibility to adjudicate claims of evasion. They seek to construe the evasion clause as a universal solvent melting away all the restraints Congress placed upon them and as a tool for imposing on cable limitations which Congress chose not to adopt.

VII. LINE ITEMIZATION SHOULD SEPARATE FRANCHISE FEES AND COSTS FROM THE CHARGE FOR CABLE SERVICE [¶175]

Continental's Comments are accompanied with a subscriber invoice from Bell Atlantic's C&P Telephone, requesting payment of $26.00, after itemizing $16.54 for monthly service, and separate line item charges for 911, the SLC surcharge, the Virginia Relay Center surcharge, federal taxes, and local taxes. NATOA requests that cable be denied a comparable right, and asks that franchise fees be buried in the monthly service charge and disclosed, if at all, only under rules established by the local franchising authorities, who would also demand itemization of confidential program affiliation charges, cash flow, and profit.

The Commission is witnessing the cities' flight from political accountability to their constituents. In recent months, Continental began to itemize franchise fees in the 60 communities it serves around Dayton. Those communities which assess no franchise fee, or one less than 5%, had a lower line item charge, resulting in lower total cost to subscribers. They were delighted. Those communities which assessed 5% franchise fees, and whose constituents therefore paid a higher total cost, have threatened to sue unless the itemization is halted.

Sec. 622 permits each cable operator to identify "as a separate line item on each regular bill of each subscriber" charges for franchise fees, PEG support, and taxes. See Continental's Comments at 75-77. The entire purpose of line itemization is to provide voters with fair disclosure of the hidden taxes assessed through the franchising process. Burying the charges in the bill deflects the very accountability intended by Congress. It also denies cable the very rights now exercised by Bell Atlantic, who already offers video transport services and seeks to overbuild the cable operator in the very community for which its itemized invoice originated.

Line itemization also harmonizes marketing with billing. In order to use mass media covering multiple communities, it is necessary to advertise "$20 plus franchise fee." The clearest invoice would reflect the same price.

NATOA's request (p.60 n.28) to control the "format and content" of sales information provided by cable is a backdoor effort to extend its hatred of itemized taxes into a gag order on truthful advertising. Whatever is done on the invoice, the Commission must clarify that cable operators are free to tell subscribers the truth about franchise fees in other media, without municipal gag orders.

VIII. LEASED COMMERCIAL ACCESS [¶146-170]

Continental submits that the only pricing mechanism set forth in the Comments which can realistically prevent artificial migration of existing services to leased access is to set the maximum rate as the highest net proceeds from a programmer for the preceding calendar year -- what other Comments call the highest implicit access fee. The record reveals no justification for discounted leased access for non profits or for mandated billing and collection services, for which there are existing substitutes in the market.

CONCLUSION

The Commission should adopt regulations consistent with Continental's Comments and Reply.

Respectfully submitted,

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February 11, 1993

APPENDIX A
FEDERAL COMMUNICATIONS COMMISSION
DOCKET NO. 92-266

Continental Cablevision Responses to
Rate Setting Methods
Discussed in Initial Comments

Appendix A
Federal Communications Commission — MM Docket 92-266

Continental Cablevision's Responses to Ratesetting Methods Discussed in Initial Comments

In this appendix Continental demonstrates why alternative ratesetting methods proffered by some parties in the January 27, 1993 initial comments should not be substituted for a system of rate benchmarks. We will focus our response on the comments filed by the National Association of Broadcasters (NAB) the Consumer Federation of America (CFA), and a group of cities including Austin, Texas, et al (municipal coalition).

As we noted in our initial comments, rate benchmarks will best serve the multiple ratesetting objectives of the 1992 Act. The Commission, cable subscribers and franchising authorities will be able to review a comprehensive set of price information under the rate benchmark techniques. Existing levels of effective competition, which will only increase in the future, will provide the type of check contemplated in the Act. Cable operators that have rates exceeding a range of reasonableness based on the benchmarks will reduce prices. And, in the future, cable operators' rates will be held in check by the combined behavior of the overall industry as well as by the Commission's continuing oversight and data collection programs. Most important, Congress' mandate that the ratesetting method be easy to administer and broadly understandable to consumers and franchising authorities (who will often be smaller cities and